to its contractual obligations when it enters financial *or other markets.*" *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 413, n. 14 (1983) (emphasis added).

As such, Montana acted in its own interest by shifting the burdens that resulted from its adoption of I-137 from itself to Petitioners. Therefore, the Montana Supreme Court should have considered whether Montana's adoption of I-137 constituted an "important public purpose" that was both "reasonable" and "necessary." Because the Montana Supreme Court and, in similar contexts, various federal circuit courts have decided this important federal question in a way that conflicts with the decisions of this Court and another State Supreme Court, this Court should grant *certiorari* to clarify when heightened scrutiny ought to be applied to contractual impairments by a State.

B. Petitioners Have Been Materially Harmed Because Had Heightened Scrutiny Been Applied To The State's Contract, Which The State Impaired, Montana Would Have Violated The Contracts Clause.

Petitioners have been materially harmed because the Montana Supreme Court improperly applied a deferential standard to Montana's contract impairment instead of a heightened scrutiny standard. Under the heightened scrutiny standard, for a contract impairment not to violate the Contracts Clause that impairment must be reasonable and necessary to further an important public purpose. *U.S. Trust*, 431 U.S. at 25-26. Applying this standard, Montana violated the Contracts Clause by its purposeful impairment of its contract with Petitioners because none of the three criteria required by this Court was satisfied.

First, Montana's actions did not "serve an important public purpose." The Montana Supreme Court concluded that the purpose of the contractual impairment was to "protect the environment." *Seven Up Pete Venture*, 114 P.3d at 1023. Yet I-137 did not appear to "protect the environment" because the court itself admitted that "cyanide heap leaching has been shown to be safer than other methods of mining . . . " *Id.*

Second, Montana's actions were not "necessary." For the impairment to have been necessary, it must have been impossible to achieve Montana's goals without modifying the contract. *U.S. Trust*, 431 U.S. at 29-30. Here, I-137 expressly exempts from the ban mines operating prior to November 3, 1998. If the purported public interest of environmental protection could have been achieved without requiring other mines to abide by the cyanide-leaching prohibition, that interest would also likely have been achieved had Petitioners' contract been honored.

Finally, Montana's actions were not "reasonable." In *U.S. Trust*, 431 U.S. 1, this Court analyzed the repeal of parallel State statutes in New York and New Jersey that impaired the contracts between the States and certain bondholders in an attempt to further the goals of mass transportation, energy conservation, and environmental protection. This Court concluded that the States' action was unreasonable since the contract with the bondholders was formed in spite of the States' knowledge of these goals and the potential consequences:

> [T]he need for mass transportation in the New York metropolitan area was not a new development, and the likelihood that publicly owned commuter railroads would produce substantial deficits was as well known . . . It was with full

> knowledge of these concerns that the 1962 covenant [which the state of New York attempted to repeal] was adopted.

Id. at 31-32. Similarly, Montana, understanding the need to protect the environment, entered into a contract with Petitioners knowing that Petitioners intended to use a cyanide heap leaching method to extract minerals. *Seven Up Pete Venture*, 114 P.3d 1022.

In its analysis in *U.S. Trust*, this Court distinguished *City of El Paso v. Simmons*, 379 U.S. 497 (1965). There, the State's contractual impairment was held reasonable because, absent the government impairment, the private party would have realized benefits that were "hardly to be expected or foreseen." *Id.* at 515. Here, the Montana Supreme Court concluded that no "party, even one considered sophisticated, could have reasonably anticipated, at the time the agreement was entered in 1986, that Montana would enact the first state ban of this form of mining twelve years later." *Seven Up Pete Venture*, 114 P.3d at 1022. Therefore, unlike *Simmons*, the benefits that Petitioners would have realized were "expected [and] foreseen."

Thus, Montana's actions neither served an "important public purpose" nor were "reasonable" or "necessary." Because none of the three heightened scrutiny criteria were satisfied, Petitioners suffered a cognizable injury-in-fact, a Contracts Clause violation, that should have been redressed by the Supreme Court of Montana. That Court's failure to issue such a ruling, in accordance with this Court's ruling in *U.S. Trust*, necessitates the granting of this petition.

II. THE COURT SHOULD GRANT *CERTIORARI* TO CORRECT RECENT INTERPRETATIONS OF THE CONTRACTS CLAUSE, WHICH DEVIATE SUBSTANTIALLY FROM THE ORIGINAL UNDERSTANDING OF THE CONTRACTS CLAUSE.

Since 1934, this Court has substantially deviated from the original understanding of the Contracts Clause as it relates to the ability of a State to impair contracts. The Court should seize this opportunity to reject recent interpretations of the Clause, which are irreconcilable with the original, more intrinsically sound interpretation that the Contracts Clause is absolute.

A. Though This Court Ought To Give Great Deference To Precedent, It Should Reject Precedent That Is Irreconcilable With A Prior, More Intrinsically Sound Interpretation Of The Constitution.

"The doctrine of *stare decisis* is essential to the respect accorded to the judgments of this Court and to the stability of the law," *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (wherein the Court expressly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986)); however, that doctrine is "not an inexorable command, particularly when . . . interpreting the Constitution." *Dickerson v. U.S.*, 530 U.S. 428, 443 (2000) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (expressly overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)); *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (abandoning a strict application of *stare decisis*). Instead, it is a mere "principle of policy." *Lawrence*, 539 U.S. at 577. Therefore, "[i]n prior cases, when this Court has confronted a wrongly decided, unworkable precedent calling

for some further action by the Court, [the Court has] chosen not to compound the original error, but to overrule the precedent." *Payne v. Tennessee*, 501 U.S. 808 (1991) (Souter, J., concurring) (wherein the Court partially overruled *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)). Reconsideration of earlier decisions is particularly important in constitutional cases because in such cases "correction through legislative action is practically impossible." *Payne*, 501 U.S. at 828, citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

In the context of the Contracts Clause of the U.S. Constitution, *stare decisis* is merely a helpful, though not conclusive method of analysis, particularly when recent interpretations are erroneous. Thus, "[w]hile the Court has indicated that it must apply the Contract Clause 'with due respect for its purpose and the prior decisions of this court,' the value of precedent in this area is uncertain." *Legislative Alteration of Private Pension Agreements*, 92 Harv. L. Rev. 86, 88 (1978). Ultimately, recent Contracts Clause jurisprudence should be overruled if there is a "special justification" for doing so. *Dickerson*, 530 U.S. at 443.

B. A "Special Justification" Exists, And *Stare Decisis* Should Yield, When Recent Interpretations Differ From The Original Understanding Of A Clause Of The Constitution.

A "special justification" exists when recent case law differs from a prior, more intrinsically sound interpretation. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995) (discussing *Helvering v. Hallock*, 309 U.S. 106, 119 (1940) (the Court overrode *stare decisis* in its interpretation

of estate tax law). Interpreting the Constitution based on the original understanding of the text is the most intrinsically sound method of construction. This Court has consistently recognized the importance of the actual text of these founding documents. *See, e.g., State Board of Equalization of California v. Young's Market Co.*, 299 U.S. 59, 63 (1936) (finding no need to discuss the history of the Twenty-First Amendment, subsequent Court rulings interpreting the amendment, or statutes passed in reliance on the amendment because the language of the amendment is clear); *City of Boerne v. P.F. Flores*, 521 U.S. 507, 519 (1997) ("In assessing the breadth of § 5's [of the Fourteenth Amendment] enforcement power, we begin with its text."); *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (Curtis, J., dissenting) ("When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is according to their own views of what it ought to mean."). Indeed, "the text of our Constitution is the best guide to its meaning." *Granholm v. Heald*, ___ U.S. ___, 125 S. Ct. 1885, 1920 (2005) (Thomas, J., dissenting).

When interpreting the Constitution, "[t]he words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816). Specifically, "the terms in the Constitution must be given the meaning ascribed to them at the time of their ratification." *Dickerson*, 508 U.S. at 379 (1993) (Scalia, J., concurring). To discern the original understanding of the

constitutional text, this Court must examine the contemporaneous understanding of the text, the historical perspective of the text, and the overall structure of the document. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849 (1989) (in praise of Chief Justice Taft's opinion in *Myers v. U.S.*, 272 U.S. 52 (1926)); *See also*, David F. Forte, *The Originalist Perspective, in The Heritage Guide to the Constitution* 15-16 (Edwin Meese III, *et al.*, eds., 2005). In fact, the Framers themselves applied similar interpretive methods. *Id.* As Justice Thomas explained, the purpose of this method of construction is threefold:

> First, it deprives modern judges of the opportunity to write their own preferences into the Constitution by tethering their analysis to the understanding of those who drafted and ratified the text. Second, it places the authority for creating legal rules in the hands of the people and their representatives rather than in the hands of the nonelected, unaccountable federal judiciary. Thus, the Constitution means not what the Court says it means, but what the delegates of the Philadelphia and of the state ratifying conventions understood it to mean. Third, it recognizes the basic principle of a written Constitution. We as a nation adopted a written Constitution precisely because it has a fixed meaning that does not change.

Clarence Thomas, *Judging*, 45 U. Kan. L. Rev. 1, 5 (1996).

Because originalism is the most intrinsically sound interpretation of the Constitution, a "special justification" for reversing precedent exists whenever there is a variance from the original understanding of the text. "When faced with a clash of constitutional principle and a line of

unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655, 2687 (2005) (Thomas, J., dissenting).

C. This Court Should Reject Recent Contracts Clause Jurisprudence And, Instead, Adopt An Originalist Interpretation, Whereby Any Retrospective Impairment Of A Contract By A State Would Violate The Clause.

Recent Contracts Clause jurisprudence is divorced from the contemporaneous understanding of the text, the historical perspective of the text, and the overall structure of the Constitution.

1. The contemporaneous understanding of the text.

The meaning ascribed to the text by the Framers is a helpful, though not exclusive, resource in ascertaining the contemporaneous understanding of the text. Unfortunately, in the construction of the Contracts Clause, "the debates in the Constitutional Convention are of little aid." *Blaisdell*, 290 U.S. at 427.

Nonetheless, it appears certain that the Framers presumed the Contracts Clause was absolute and wholly independent of other alleged public purposes. The Clause was inspired by the Northwest Ordinance, which read, in part: "[N]o law ought *ever* to be made or have force in the said territory, that shall, *in any manner whatever*, interfere with or affect private contracts, or engagements *bona*

fide, and without fraud previously formed." Benjamin Fletcher Wright, *The Contract Clause of the Constitution* 8 (Greenwood Press, 1982) (1938), *citing* Max Farrand, *Record of the Federal Convention* (1911), II, 439; U.S.C.A. Northwest Ordinance (emphasis added); *see also*, Richard A. Epstein, *Obligation of Contract, in The Heritage Guide to the Constitution* 171 (Edwin Meese III, *et al.*, eds., 2005). Indeed, upon introduction of the Clause at the Constitutional Convention, Gouveneur Morris worried that such a clause would prevent States from passing necessary legislation:

> This would be going too far. There are a thousand laws, relating to bringing actions – limitations of actions which affect contracts. The Judicial power of the U. S. will be a protection in cases within their jurisdiction; and within the State itself a majority must rule, whatever may be the mischief done among themselves.

The Avalon Project at Yale Law School, *The Debates in the Federal Convention of 1787 reported by James Madison: August 28* (Nov. 18, 2005), *available at* http://www.yale.edu/lawweb/avalon/debates/828.htm.

In an address to the Maryland House of Delegates, another delegate to the Convention, Luther Martin, expressed concern that the Clause would preclude state legislation even in times of "great public calamities." *Blaisdell*, 290 U.S. at 461-62 (Sutherland, J., dissenting) (citing 1 *Elliot's Debates*, 344, 376, 377). Mr. Martin's statement is evidence that the Framers believed that the Contracts Clause is absolute.

Furthermore, in the years following the Constitutional Convention, contemporaries believed the Clause was absolute. At the Virginia Ratifying Convention in 1788, Patrick Henry explained that a public contract could not be altered or impaired, no matter how compelling the public need.

> How will this thing [the Contracts Clause] operate, when ten or twenty millions are demanded as the quota of this state? You will cry out that speculators have got it at one for a thousand, and that they ought to be paid so. Will you then have recourse, for relief, to legislative interference? They cannot relieve you, because of that clause. The expression includes public contracts, as well as private contracts between individuals. Notwithstanding the sagacity of the gentleman, he cannot prove its exclusive relation to private contracts. Here is an enormous demand, which your children, to the tenth generation, will not be able to pay. Should we ask if there be any obligation in justice to pay more than the depreciated value, we shall be told that contracts must not be impaired. Justice may make a demand of millions, but the people cannot pay them.

The Founders Constitution, *Debate in the Virginia Ratifying Convention* (Nov. 28, 2005), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_10_1s8.html.

Likewise, Alexander Hamilton reasoned, in 1796, that an impairment by a State legislature of a contract in which the State was a party was a *per se* violation of the Contracts Clause. Giving his opinion as to the constitutionality of a repeal of the sale of land from the State of Georgia to purportedly unscrupulous land companies, he wrote:

> Every grant from one to another, whether the grantor be a state or an individual, is virtually a contract . . . [and] the revocation of the grant by the act of the legislature of Georgia may justly be considered as contrary to the Constitution of the United States and, therefore null.

Wright, *supra*, 8, 22.

Later, in 1819, Daniel Webster, in a successful argument to this Court, asserted that the people, in ratifying the Constitution, wisely limited the ability of a State to impair contracts, even in times of apparent necessity. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 598 (1819) (overturning an act by the New Hampshire legislature which impaired an existing contract). Similarly, in 1827, lawyer and court reporter Henry Wheaton argued that "the Convention intended to prohibit every possible mode in which the obligation of contracts might be violated by state legislation." *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (upholding a state bankruptcy statute because no contractual obligation was impaired). Chief Justice Marshall agreed with Wheaton on this point, and concluded that "[a] State is entirely forbidden to pass laws impairing the obligation of contracts." *Id.* at 335 (per Chief Justice Marshall). Conversely, in the 50 years following ratification of the Constitution, very few interpretations of the Contracts Clause limited its applicability. *See, e.g., id.* at 286 (per Justice Johnson). Ultimately, in 1977, this Court conceded that the Contracts Clause was originally understood as "an absolute bar to any impairment . . . " *U.S. Trust*, 431 U.S. at 19, n. 17.

2. The historical perspective of the text.

A careful analysis of the Contracts Clause's historical underpinnings also reveals its absolutism. It has been argued often that the Contracts Clause is not absolute because the sole purpose of the Clause was to protect the rights of Revolutionary War creditors. *See, e.g., Blaisdell*, 290 U.S. at 453-54 (Sutherland, J., dissenting); *Allied Structural Steel*, 438 U.S. at 257 (1978) (Brennan, J., dissenting). This interpretation ignores, however, the greater context in which the Constitutional Convention took place. Obviously, this was a period during which the Framers endeavored to establish a new, stable society. Many delegates were esteemed businessmen who believed that commerce was, in and of itself, a social good that was best cultivated through the freedom to contract. Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 707 (1984). They desired, through the Contracts Clause, to "inspire a general prudence and industry, and give a regular course to the business of society." *The Federalist* No. 44 (J. Madison). *See also U.S. Trust*, 431 U.S. at 15 ("[T]he general purpose of the Clause was clear: to encourage trade and credit by promoting confidence in the stability of contractual obligations.").

In addition, the delegates at the state ratifying conventions viewed the Contracts Clause in a broader historical context. Edmund Randolph of Virginia supported the Clause because it prevented the fraud and injustice that had been perpetrated by state legislatures that had impaired contracts. *Blaisdell*, 290 U.S. at 462 (Sutherland, J., dissenting) (citing 3 *Elliot's Debates* 478). Charles Pinckney of South Carolina argued that the Clause was the very "soul of the Constitution," mandating that States "cultivate those principles of public honor and private

honesty which are the sure road to national character and happiness." *Blaisdell*, 290 U.S. at 462 (Sutherland, J., dissenting) (citing 4 *Elliot's Debates* 333).

Further, Chief Justice Marshall, in a majority opinion explaining the purpose of the Contracts Clause, wrote: "That anterior to the formation of the [C]onstitution, a course of legislation had prevailed in many, if not in all, of the states, which weakened the confidence of man in man, and embarrassed *all transactions between individuals*, by dispensing with a faithful performance of engagements." *Trustees of Dartmouth Coll.*, 17 U.S. at 628 (emphasis added). It is evident that, according to Justice Marshall, the Framers intended the Contracts Clause to be absolute.

Therefore, examination of the historical context indicates that the Framers intended to prohibit, absolutely, State impairment of all contracts, not merely debt contracts.

3. The overall structure of the Constitution.

Finally, the Constitution's structure mandates a strict interpretation of the Contracts Clause. A central objective of the Constitution is to limit accumulation of government power. This theme is inherent in the doctrine of enumerated powers, the checks and balances system, and the bicameral legislature of the federal government. More explicitly, this theme is also evident in the enumerated limitations on State government power, as listed in Article I, section 10. Although the first part of the Clause is specific, the second part is more general. To be sure, Clause 1 of that section prohibits States from coining money, emitting bills of credit, or making anything except gold or silver legal tender in the payment of debts. These

prohibitions evince a specific concern for the debtor-creditor relationship. Unlike these provisions, the rest of the Clause is written in far more general terms; States are generally prohibited from passing bills of attainder, *ex post facto* laws or "impairing the Obligation of Contracts." This suggests an application far broader in context than merely the debtor-creditor relationship.

Moreover, the structure of the Constitution indicates that no public purpose – not even an emergency – permits a State to impair the obligation of contracts. The Constitution specifically provides for certain exigencies. As Justice Sutherland wrote in his dissent in *Blaisdell*:

> The emergency of war furnishes an occasion for the exercise of certain of the war powers . . . The existence of another kind of emergency authorizes the United States to protect each of the states of the Union against domestic violence Const. art. 4, § 4 . . . [But unlike these clauses, the Contracts Clause] restricts every state power in the particular specified, no matter what may be the occasion. It does not contemplate that an emergency shall furnish an occasion for softening the restriction or making it any the less a restriction upon state action in that contingency than it is under strictly normal conditions.

Blaisdell, 290 U.S. at 473 (Sutherland, J., dissenting).

Simply put, the structure of the Constitution indicates that no State may impair the obligations of any contract, regardless of the type of contract or the public purpose.

4. Recent interpretations of the Contracts Clause and proposed solution.

In spite of the original meaning of the Contracts Clause, this Court has held, under the guise of the States' police power, that "the common weal" and "the general good of the public" are sufficient justifications for dispensing with the Contracts Clause. *Blaisdell*, 290 U.S. at 240. To that end, this Court pronounced that when a State's self-interest is at stake, a State's impairment of a contract "may be constitutional if it is reasonable and necessary to serve an important public purpose." *U.S. Trust*, 431 U.S. at 25. These interpretations so weakened the Contracts Clause that this Court found it necessary to remind the people that "the Contract Clause remains a part of our written Constitution" and "is not a dead letter." *Id.* at 16; *Allied Structural Steel*, 438 U.S. at 241. These recent interpretations also eroded the freedom to contract, a bedrock principle of a free society, and the originalism principles necessary to ensure a true rule of law.

In the past, when constitutional jurisprudence has strayed from the proper, original interpretation, this Court has not shirked its duty to correct the error. *See, e.g., Lawrence*, 539 U.S. 558; *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Payne*, 501 U.S. 808. Here, the Montana Supreme Court has reasoned that Petitioners' contract was impaired, yet, contrary to original interpretations of the Clause, it concluded that the impairment was constitutional. This Court should seize the opportunity to apply an originalist interpretation of the Contracts Clause, thereby reversing the judgment of the Montana Supreme Court and rectifying Contracts Clause jurisprudence hereafter.

CONCLUSION

Inconsistent with U.S. Supreme Court precedent and the holding of another State Supreme Court, the Montana Supreme Court applied deferential scrutiny to an impairment of its own contract. In addition, recent Contracts Clause jurisprudence of this Court has deviated substantially from the original, absolute interpretation of the Clause. Therefore, Mountain States Legal Foundation respectfully requests that this Court grant this Petition for *Writ of Certiorari* to correct these errors.

Respectfully submitted,

WILLIAM PERRY PENDLEY*
*Counsel of Record
JOEL M. SPECTOR
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021

Attorneys for Amicus Curiae

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